

**STATE OF CALIFORNIA**

**OFFICE OF ADMINISTRATIVE LAW**

**2008 OAL DETERMINATION NO. 18  
(OAL FILE # CTU 2008-0131-01)**

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IN THE OFFICE OF  
2008 AUG -4 PM 4:15

**REQUESTED BY: Edmund Carolan**

**CONCERNING: Department of Corrections and Rehabilitation Department  
Operations Manual sections 31130.6, 31130.6.1, 31130.6.2, and  
31130.6.3, Hiring-Above-Minimum Salaries for Extraordinary  
Qualifications.**

**DETERMINATION ISSUED PURSUANT TO  
GOVERNMENT CODE SECTION 11340.5.**

**SCOPE OF REVIEW**

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

**ISSUE**

On January 31, 2008, Edmund Carolan (Petitioner) submitted a petition to OAL challenging the Hiring-Above-Minimum (HAM) salary provisions found in the Department Operations Manual (DOM), a publication of the Department of Corrections and Rehabilitation (CDCR). The only challenged HAM provisions are DOM sections 31130.6, 31130.6.1, 31130.6.2, and 31130.6.3, located in chapter 3 (Personnel, Training, and Employee Relations), article 13 (Salary and Classifications) of the DOM. The entire text of the challenged DOM sections is attached as Exhibit A.

The four challenged sections pertain to applicants for CDCR employment who have extraordinary qualifications and qualify for a HAM starting salary. The following summarizes the four challenged DOM sections:

*DOM section 31130.6. Hiring-Above-Minimum (HAM) Salary Rates for Extraordinary Qualifications.*

The Department of Personnel Administration (DPA) may authorize HAM salaries to bring a person who has extraordinary qualifications into state service. Current state employees shall not be considered for HAM salaries.

HAM salaries may be offered to extraordinarily qualified applicants for CDCR employment only when the minimum starting salary for the classification is not attractive to the applicant. Firm salary commitments shall not be made prior to official approval.

*DOM section 31130.6.1. Delegated Classifications.*

CDCR has authority to approve HAM salaries for selected medical, nursing and related classifications. CDCR authority to approve HAM salaries for these classifications is delegated from DPA.

*DOM section 31130.6.2. Approval.*

CDCR Personnel Operations shall be the approval authority for HAM salary requests for delegated classifications. HAM salary requests for delegated classifications shall be submitted to CDCR Personnel Operations at least five working days before the proposed reporting date of the applicant, and shall be approved before salary commitments are made and before employees begin work.

HAM salary requests for non-delegated classifications require DPA approval, shall be submitted to CDCR Personnel Operations at least ten working days before the proposed reporting date of the applicant, and shall be approved before salary commitments are made and before employees begin work.

*DOM section 31130.6.3. Standards.*

HAM salaries shall only be considered for extraordinarily qualified applicants who will provide a significant contribution to CDCR beyond that which other applicants offer. An applicant shall be considered extraordinarily qualified and eligible for a HAM salary based upon standards and criteria that include the following:

- Unique talent, ability, or skill as demonstrated by previous employment experience.
- Comparison of qualifications to other applicants and current state employees
- Current salary and other job offers
- Difficulty in recruitment for the position
- Prior state employment

Current state employees shall not be considered for a HAM salary. HAM salaries shall not be granted retroactively after an applicant enters state employment.

Petitioner challenges these four DOM provisions as alleged underground regulations<sup>1</sup> issued in violation of Government Code section 11340.5.<sup>2</sup> The scope of this determination is limited to the four challenged HAM sections in the DOM.<sup>3</sup>

## **DETERMINATION**

OAL determines that the challenged HAM provisions in DOM sections 31130.6, 31130.6.1, 31130.6.2, and 31130.6.3 meet the definition of a "regulation" as defined in section 11342.600 and that they should have been adopted pursuant to the APA.

## **FACTUAL BACKGROUND**

Petitioner was hired by CDCR in May 2007 from a list of eligible applicants. The precise chronology of events is unclear, but we will assume the following facts based upon the allegations and exhibits in the record<sup>4</sup> and information obtained during our review from CDCR and DPA. Petitioner was told during the hiring process that he could be qualified to receive a starting salary above the minimum range for his classification (a HAM salary), possibly at the maximum range for his classification. CDCR informed Petitioner in March 2007 that the HAM salary had been denied. Despite the denial, Petitioner accepted the position with CDCR and filed a grievance with CDCR in June 2007 alleging a violation of his bargaining unit's Memorandum of Understanding (MOU) and seeking reversal of the HAM denial. In a letter dated November 2, 2007, Petitioner was informed by the CDCR Office of Labor Relations that his grievance had been denied. Citing CDCR's initial denial of the HAM salary based in pertinent part on the HAM provisions in the DOM,<sup>5</sup> CDCR found no violation of Petitioner's MOU.

Subsequently, Petitioner submitted a petition to CDCR pursuant to section 11340.6<sup>6</sup> asking CDCR to formally adopt the HAM provisions in the DOM in compliance with the

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<sup>1</sup> An underground regulation is defined in title 1, section 250:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

<sup>2</sup> Unless otherwise specified code references are to the California Government Code.

<sup>3</sup> This determination is specifically limited in scope to these four HAM sections in the DOM. OAL is not reviewing or rendering an opinion on the validity of underlying DPA HAM policy issued in its personnel memoranda, PMLs, or other DPA guidelines. These were not challenged as underground regulations and DPA is not a party to this petition. For similar reasons, this determination does not address underlying issues that associate CDCR and DPA in establishing CDCR HAM policy, DPA's authority to delegate HAM policy to CDCR or to state agencies in general, or DPA's authority to establish HAM policy.

<sup>4</sup> See Petitioner's rebuttal, May 18, 2008.

<sup>5</sup> Petitioner was informed in this CDCR correspondence, and in DPA correspondence he apparently received after filing his petition with OAL, that CDCR's denial of his HAM was based on the HAM sections in the DOM and, by reference, to various HAM policies established by DPA. Only the HAM sections in the DOM cited in these letters are pertinent for purposes of this determination. These letters make clear the allegation in Petitioner's OAL petition that CDCR's denial of the HAM salary was based on the HAM provisions in the DOM.

<sup>6</sup> A section 11340.5 petition is different from a section 11340.6 petition. A section 11340.6 petition is made to the state agency by any interested person requesting that the state agency formally adopt, amend, or

APA. CDCR denied this petition and, pursuant to section 11340.7(d), CDCR's written decision for its denial was published in the California Regulatory Notice Register on January 28, 2008 (vol. 3-Z, pp. 73-74). Petitioner then filed this petition with OAL on January 31, 2008, pursuant to section 11340.5, challenging the HAM provisions in the DOM as underground regulations.

CDCR responded to the section 11340.5 petition on May 5, 2008, arguing that the HAM provisions in the DOM are not required to be adopted pursuant to the APA. The following summarizes the arguments in CDCR's response:

1. CDCR has the authority to regulate certain aspects of HAM salaries for new state employees. This authority is derived from DPA, whose authority is derived from section 19836 of the Government Code.
2. The challenged HAM provisions in the DOM are outdated and are therefore not underground regulations as defined in title 1, California Code of Regulations, section 250. CDCR administration of all medical classifications is currently under control of federal receivership under the *Plata* decision. The challenged HAM provisions in the DOM would have been accurate prior to PML No. 2007-026<sup>7</sup> and the *Plata* receivership.
3. Amendment of regulatory portions of DOM are approved by CDCR's Secretary and forwarded to OAL in compliance with the APA. This process assures compliance with the APA and, accordingly, the HAM provisions in the DOM are not underground regulations because they have been vetted by this process.

On May 18, 2008, OAL received Petitioner's rebuttal to CDCR's response to the petition. The rebuttal reiterates the arguments made in the petition and disagrees with the arguments made in CDCR's response. OAL received no public comments for this petition.

## UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

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repeal regulations in compliance with the APA. The state agency is required to respond to such a petition indicating whether the agency will formally adopt, amend, or repeal regulations as requested. A section 11340.5 petition is made to OAL, alleging that a state agency is using an underground regulation.

<sup>7</sup> "PML" is apparently an acronym for Personnel Management Liaisons, the addressees of DPA memoranda distributed to state agencies. PML No. 2007-026 was issued on September 25, 2007 to update DPA's "Personnel Management Delegation Program," which, among other things, includes HAM salaries.

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

### ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule contains a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).<sup>8</sup>

The first element of a regulation is whether the rule applies generally. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. The HAM provisions in the DOM apply to such a clearly defined class of persons—all applicants seeking employment with CDCR and requesting HAM salaries for positions within designated medical classifications. The first element is, therefore, met.

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<sup>8</sup> Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. CDCR states in its response that the HAM provisions in the DOM implement section 19836 HAM policy from authority it derives from the DPA delegation. Government Code section 19836 provides for the administration of HAM salaries by DPA. Section 19836(a) provides:

[DPA] may authorize payment at any step above the minimum salary limit to classes or positions in order to meet recruiting problems, to obtain a person who has extraordinary qualifications, to correct salary inequities resulting from actions by the department or State Personnel Board, or to give credit for prior state service in connection with appointments, promotions, reinstatements, transfers, reallocations, or demotions.

Additionally, Government Code section 11152 provides:

So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department and may assign to its officers and employees such duties as he sees fit.

CDCR's authority to adopt regulations governing its activities necessarily includes its hiring practices. The challenged HAM sections expressly set forth standards for CDCR to determine eligibility for HAM salaries and establish procedures for CDCR to process HAM salary requests. DOM section 31130.6 sets forth the preliminary requirements (e.g., that current state employees cannot be considered). DOM section 31130.6.1 establishes that DPA has delegated its approval of HAM salaries for medical, nursing, and related classifications. DOM section 31130.6.2 sets forth the CDCR process for approval, including the timeframe in which requests must be made. And DOM section 31130.6.3 sets forth the standards and criteria for determining if an applicant is "extraordinarily qualified." See the summary of the provisions, *supra*, on page 2 of this Determination and the full text of the provisions attached as Exhibit A.

These challenged HAM provisions establish policies and procedures for HAM salaries authorized by CDCR. These HAM provisions implement, interpret, or make specific sections 11152 and 19836 of the Government Code, and therefore, the second element in *Tidewater* is met. Accordingly, we conclude that the challenged HAM provisions in the DOM meet the definition of "regulation" as defined in section 11342.600.

The final issue to examine is whether the challenged HAM provisions in the DOM fall within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.<sup>9</sup> Exemptions may also be specific

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<sup>9</sup> See Government Code section 11340.9. For example, section 11340.9(d) provides that the APA does not apply to "[a] regulation that relates only to the internal management of the state agency." In order for a rule to fall within this exemption, it must directly affect only the employees of the issuing agency. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932 [107 Cal.Rptr. 596] and *Stoneham v. Rushen* (*Stoneham I*))

to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*” (Emphasis added.)

We were unable to find any statutory APA exemption that would apply to the DOM sections challenged by this petition.<sup>10</sup>

### AGENCY RESPONSE

The following addresses the arguments made by CDCR in its response to the petition.

1. CDCR has the authority to regulate certain aspects of HAM salaries for new state employees. This authority is derived from DPA, whose authority is derived by section 19836 of the Government Code.

The question of authority is not determinative of whether an underground regulation exists. We only need to determine whether the HAM provisions issued by CDCR meet the definition of “regulation” as defined in section 11342.600 that should have been adopted pursuant to the APA. The question of authority becomes relevant only when an agency proposes to adopt regulations pursuant to the APA, the applicable requirements of which assure that a duly adopted regulation is within the agency’s quasi-legislative authority. CDCR’s authority to implement HAM policy is not an issue in this determination, and we make no finding on the authority of CDCR to adopt regulations directly related to HAM salaries.

2. The challenged HAM provisions in the DOM are outdated and are therefore not underground regulations as defined in title 1, California Code of Regulations, section 250. CDCR administration of all medical classifications is currently under control of federal receivership under the *Plata* decision. The challenged HAM provisions in the DOM would have been accurate prior to PML No. 2007-026 and the *Plata* receivership.

OAL informed CDCR of its option to issue a certification pursuant to title 1, California Code of Regulations, section 280, that CDCR is not using, enforcing, or will not attempt to enforce the HAM provisions currently in the DOM. CDCR chose not to issue the certification.

Additionally, CDCR’s claim that the California prisons are currently under control of federal receivership under the *Plata* decision does not mean the challenged HAM sections are not underground regulations. The *Plata* decision is a compilation of cases on the same subject. CDCR has not provided a citation to any specific language in any of

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(1982) 137 Cal.App.3d 729 [188 Cal.Rptr. 130].) Because the HAM sections affect applicants for employment with CDCR, i.e., people who are not employees of CDCR, the HAM sections do not fall within the internal management exemption of the APA.

<sup>10</sup> Both CDCR and DPA were consulted on the issue of an applicable APA exemption. CDCR was unable to find an applicable exemption, and DPA declined to comment.

these cases that would provide an exemption from the procedures of the APA. Without an express statutory exemption or language in the court's decision establishing an APA exemption, OAL rejects this argument.

3. Amendment of regulatory portions of DOM are approved by CDCR's Secretary and forwarded to OAL in compliance with the APA. This process assures compliance with the APA and, accordingly, the HAM provisions in the DOM are not underground regulations because they have been vetted by this process.

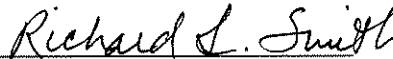
After careful regulatory research, OAL found no evidence of the HAM provisions having been adopted by CDCR in compliance with the procedural requirements of the APA. The DOM is a collection of provisions, labeled as operational policies, that is published by and solely the product of CDCR. OAL has no oversight or affiliation with what CDCR publishes in the DOM. The fact that regulatory provisions in the DOM may include duly-adopted regulations does not necessarily mean that all DOM regulatory provisions have first been properly adopted pursuant to the procedural requirements of the APA.

### CONCLUSION

The challenged HAM provisions in DOM sections 31130.6, 31130.6.1, 31130.6.2, and 31130.6.3 meet the definition of a "regulation" as defined in section 11342.600. They do not fall within any express APA exemption, and should, therefore, have been adopted pursuant to the APA.

August 4, 2008

  
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SUSAN LAPSLEY  
Director

  
\_\_\_\_\_  
Richard L. Smith  
Staff Counsel

# Exhibit A

- File suit in a superior court, if the dollar amount exceeds the limits for small claims court.

## **31130.6 Hiring-Above-Minimum (HAM) Salary Rates for Extraordinary Qualifications**

The DPA may authorize payment above the minimum step in the salary range in order to bring a person who has extraordinary qualifications into state service. Current state employees shall not be considered for these rates.

Special hiring rates under this authorization may be offered to an unusually well qualified person when the minimum step of the range is not attractive. Firm salary commitments shall not be made prior to official approval.

### **31130.6.1 Delegated Classifications**

The Department has the delegated authority to approve HAMs (second to fifth step, inclusive) for selected medical, nursing and related classifications. This authority and the classifications affected are specified in a DPA memorandum published at the beginning of each fiscal year. A copy of the memorandum is available for review in the institutional personnel offices and Personnel Operations Section, Central Office.

### **31130.6.2 Approval**

HAM requests shall be approved before salary commitments are made and before employees begin work.

The Personnel Operations Section analysts and institutional personnel officers are the approval authority for delegated classifications. Their authority is limited in accordance with the DPA memorandum and any subsequent guidelines published by DPA.

HAMs for other classifications require DPA approval.

HAM requests shall be received:

- By the Personnel Operations Section or institution personnel officer at least five working days before the proposed reporting date for delegated classification.
- By the Personnel Operations Section at least ten working days before the proposed reporting date for classifications requiring DPA approval.

### **31130.6.3 Standards**

#### **Contribution to the Agency**

Extraordinary qualifications should provide to the work of the Department a significant contribution beyond that which other applicants offer, for example:

- Expertise in a particular area of the Department's program. This expertise must be well beyond the normal requirements of the class.
- Unique talent, ability, or skill as demonstrated by previous job experience. The scope and depth of such experience is more significant than its length.

The degree to which a candidate exceeds minimum qualifications shall be a guiding factor, rather than a determining one. When a number of candidates offer considerably more than minimum qualifications, it may not be necessary to pay above the minimum to acquire an unusually well qualified person.

The qualifications of state employees already in the same or closely related classes shall be carefully considered since questions of salary equity may arise. Inequity adjustments shall not result from use of this delegation.

#### **Current Salary and Other Job Offers**

If the criteria for extraordinary qualifications are otherwise met, the individual's present salary or other bona fide salary offers normally shall be above the first step of the class before the candidate can be considered for a special hiring rate.

Current competitive salary offers shall be verified. The name of persons contacted, telephone numbers and dates of contact, and data obtained shall be included on the request form.

#### **Recruitment Difficulty**

Recruitment difficulty is a factor to the extent that a specific extraordinary skill is difficult to recruit, even though some applicants are qualified in the general skills of the class.

#### **Prior State Employment**

The Department approves (or requests approval of) HAMs for extraordinary qualifications only for persons who are not now in state

civil service. Above-minimum rates cannot be granted retroactively once the individual becomes a state civil service employee.

Prospective employees with prior state service (civil or exempt service, including that with the University of California, state colleges, the Legislature and other groups) shall be evaluated in the same manner as other applicants. However, to qualify for a higher rate of pay than they received as state employees, they shall clearly have qualifications above those they possessed as state employees.

Employees re-entering state service under DPA Rule 599.677, Rate on Reappointment or Reinstatement After Permanent Separation, are not eligible for a special hiring rate under this section.

### **31130.6.4 Determining the Amount of Adjustment**

#### **Established Rate**

Once the hiring authority determines that a special hiring rate is necessary to attract an outstanding individual, the hiring authority shall decide which hiring rate to request.

In order to be competitive with other employers, yet offer no more than is necessary, the actual rate granted is an established rate between the minimum and maximum for the class nearest (above or below) to the individual's present salary or other valid job offers. This is any established rate between the existing steps for the class if it will more closely approximate a realistic appraisal of the individual's background and salary history.

#### **Limitations**

Special hiring rates are usually limited to two steps above the minimum of the salary range, i.e., the third salary step. When the position has limited promotional opportunity, use of hiring rates above that rate limits the Department's ability to use merit salary adjustments to recognize employee growth and encourage initiative.

Adjustments above the third step shall be processed only when the factors of extraordinary qualifications, present salary, or prospective job offers make a strong case for the particular individual.

#### **Determining the Above-Minimum Rate**

The individual's monthly salary (or highest bona fide job offer) is compared to the state's pay ranges in determining the maximum amount to authorize. Money earned through part-time employment is counted in determining the above-minimum rate only when the individual would lose this income by coming to work for the Department.

When an individual's total income covers periods substantially less than twelve months and that individual does not work for the remainder of the year, the income is considered as the function of the number of months worked; e.g., \$10,000 per year for a ten month work year is considered as \$1,000 per month. When there is additional income from a second job from which the individual must resign, that should be added to the total and the full year considered.

#### **Consideration of Other Offers**

Other competitive salary offers from state agencies shall not be used as justification for exceeding these other offers for above minimum rates. When the provisions outlined here are applied correctly, above minimum rates authorized for outstanding qualifications for a given individual shall be identical for all state agencies using the class.

#### **Moving Expense**

The salary shall not include a bonus to the candidate to come to the State; however, when relocation involves an unusual moving expense, an above minimum rate may be justified where use of the candidate's qualifications is particularly critical to the Department's program. Advance approval by DPA is required in these cases.

#### **Applicable Authorizations**

Under delegation, an individual ordinarily cannot receive above minimum steps under more than one special salary authorization. Regarding entrance into college recruitment classes, it may be found that an individual possesses superior scholastic achievement. Also, there may be a general hiring "plus" rate authorized on the basis of recruitment difficulty. The Department decides which of the applicable authorizations is needed to acquire the individual.

#### **Required Explanation**

If the rate approved for the individual does not fall at one of the normal steps within the salary range for that class, the hiring authority shall provide the appointee with an explanation of the possible effect on movement through the salary range under DPA rules.

#### **Corrective Salary Action**

Special adjustments for outstanding qualifications are not a substitute for corrective salary action for a class. If there are a number of vacancies in a given class and recruitment is difficult, recruitment "plus" differential or special corrective salary action for the class may be necessary.